

**FILED UNDER SEAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

WSOU INVESTMENTS, LLC d/b/a BRAZOS  
LICENSING AND DEVELOPMENT,

Plaintiff,

v.

DELL TECHNOLOGIES INC., DELL INC.,  
AND EMC CORPORATION,

Defendants.

Case No. 6:20-cv-00476-ADA-DTG

**JURY TRIAL DEMANDED**

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CONTAINS CONFIDENTIAL  
INFORMATION**

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION  
UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)**

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<b>Abbreviation</b>	<b>Term</b>
'435 patent	U.S. Patent No. 7,565,435
Br.	Defendants' Opposed Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Federal Rule of Civil Procedure 12(b)(1), Dkt. 183
Defendants	Dell Technologies Inc., Dell Inc., and EMC Corporation
Opp.	Plaintiff's Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Federal Rule of Civil Procedure 12(b)(1), Dkt. 192
USPTO	United States Patent and Trademark Office
WSOU	WSOU Investments, LLC

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**TABLE OF EXHIBITS**

<b>Exhibit</b>	<b>Document</b>
A	USPTO Reel 014846 Frame 0706
B	USPTO Reel 022803 Frame 0453
C	USPTO Reel 045085 Frame 0001

██████████ And, contrary to WSOU’s argument, lack of such right is a constitutional standing issue.

This lawsuit should be dismissed.

Specifically, WSOU argues that “past damages” is a question of prudential or “statutory”

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standing. Opp. 10-12. Notably, WSOU cites not a single case holding that the question of whether *any* rights exist to past damages raises only a statutory standing question. Instead, WSOU misconstrues the Federal Circuit’s standing cases and insists it must only allege that “(i) Brazos is the owner of the asserted patent; (ii) Dell has infringed the asserted patent; (iii) Brazos suffered economic injury caused by Dell; and (iv) Brazos is entitled to recover damages.” Opp. 12. If mere allegation were sufficient, standing would never be an issue in any case.<sup>2</sup>

Rather, in *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, the Federal Circuit confirmed that whether a party possesses *any* exclusionary rights for the pertinent time period is a constitutional standing issue, while prudential standing examines the *substantiality* of those rights. 925 F.3d 1225, 1234-36 (Fed. Cir. 2019) (plaintiff had exclusionary rights and thus, constitutional standing—but, constraints on exercise of the rights during pertinent period meant it lacked “all substantial rights” and needed to join the assignor as co-plaintiff); Br. 5-6. WSOU’s sole argument, that it had *some* “exclusionary rights” when it filed its complaint, overlooks that it had *no* rights before December 22, 2017. Without exclusionary rights *for that* period, WSOU cannot show injury during that period. *WiAV Sols. LLC v. Motorola, Inc.*, 631 F.3d 1257, 1263-67 (Fed. Cir. 2010) (constitutional standing “coterminous with” scope of exclusionary rights).<sup>3</sup>

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<sup>2</sup> WSOU asserts *Schwendimann* supports its argument that standing can be met via boilerplate allegations. But that case did not analyze whether a patentee’s lack of rights for the pertinent period posed a constitutional standing problem; it analyzed what constitutes a written assignment. *Schwendimann v. Arkwright Advanced Coating, Inc.*, 959 F.3d 1065, 1072 (Fed. Cir. 2020). Given that the Federal Circuit analyzed the written agreement, WSOU’s assertion that simply alleging ownership is sufficient to confer standing is wrong.

<sup>3</sup> WSOU’s cited cases, Opp. 17 n.8, are also inapposite. None involved the complete absence of any exclusionary rights for the past damages period. When there is a lack of any exclusionary rights for the pertinent time period, constitutional standing is implicated, and it cannot be cured by “agreement retroactively.” *EMA*, 2022 WL 2759094, at \*10.

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[REDACTED]

[REDACTED] WSOU has it backwards. In New York, a specific contractual provision controls over a more general one. Br. 11 (citing cases). The Federal Circuit also follows this canon of contract interpretation. *Hometown Fin., Inc. v. U.S.*, 409 F.3d 1360, 1369 (Fed. Cir. 2005).<sup>4</sup>

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<sup>4</sup> [REDACTED]

<sup>5</sup> WSOU asserts *DDB Techs., LLC v. MLB Advanced Media, L.P.* rejected the same argument made by Defendants here. Opp. 14. But that case did not reach ownership—it was remanded for further discovery. 517 F.3d 1284, 1294 (Fed. Cir. 2008) (“Because we hold that further jurisdictional discovery was warranted, we do not reach the issue of whether the district court correctly held on the previous record that the patents in suit fell within the scope of Barstow’s employment agreement[.]”).



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██████████.<sup>6</sup> *In re Spinnaker Indus., Inc.*, 313 F. App'x 749, 754 (6th Cir. 2008) (“Our obligation under New York law is to discern the parties’ ‘purpose and intent’ from the ‘four corners of the document.’”); *Hoeg Corp. v. Peebles Corp.*, 60 N.Y.S.3d 259, 261 (2017) (determining “intent” from contract “without looking to extrinsic evidence to create ambiguities”). Thus, WSOU’s arguments should be disregarded.<sup>7</sup> *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*,

6 [REDACTED] EMA, 2022 WL 2759094, at \*6 (no weight to biased party's declaration); *Dutschmann v. City of Waco*, 2022 WL 837500, at \*3 (W.D. Tex. Feb. 23, 2022) (“[L]egal conclusions” are “inappropriate for inclusion in a sworn declaration”); *W.C. Chapman, L.P. v. Cavazos*, 2022 WL 1558502, at \*5 (E.D. Tex. May 17, 2022) (disregarding conclusions in declaration); *Cofimco USA Inc. v. Mosiewicz*, 2016 WL 1070854, at \*4 (S.D.N.Y. Mar. 16, 2016) (giving little weight to “two self-serving declarations submitted by [Plaintiff]”).

<sup>7</sup> WSOU's cited cases, Opp. 18-19, are distinguishable.

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58 N.Y.S.3d 874 (N.Y. Sup. 2017) (“[P]arty’s own subjective understanding of a contract, even if it makes commercial sense, is irrelevant.”).

Dated: July 18, 2022

By: /s/ Barry K. Shelton

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on July 18, 2022, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document by e-mail.

/s/ Barry K. Shelton  
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